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Reply Brief 1975-SC-0656

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**KYSC1975-SC-0656-01**

{C81EA45B-6E8A-4D51-850E-7E81993C6AF3}

{134943}{54-130315:091115}{020276}

# REPLY BRIEF

3825  
SUPREME COURT OF KENTUCKY

FILE NO. 75-656

VERNON SMITH and  
BILLY KIMMEL

APPELLANTS

VS.


APPEAL FROM MUHLENBERG CIRCUIT COURT  
HON. ARTHUR T. ILER, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANTS

JACK EMORY FARLEY  
PUBLIC DEFENDER  
COMMONWEALTH OF KENTUCKY  
625 LEAWOOD DRIVE  
FRANKFORT, KENTUCKY 40601

  
WILLIAM M. RADIGAN  
ASSISTANT PUBLIC DEFENDER

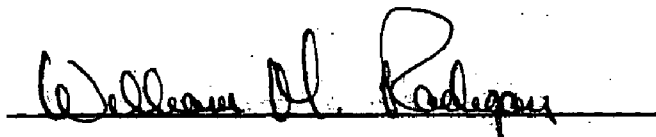
CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Reply Brief For Appellants has been mailed, postage prepaid, to Hon. Arthur T. Iler, Judge, Muhlenberg Circuit Court, Muhlenberg County Courthouse, Greenville, Kentucky 42345; Hon. James D. Cornette, Commonwealth Attorney, 45th Judicial District, Greenville, Kentucky 42345; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 2nd day of February, 1976.

FILED

FEB 2 1976

MARTHA LAYNE COLLINS  
CLERK  
SUPREME COURT



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SUPREME COURT OF KENTUCKY

FILE NO. 75-656

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APPELLANTS

VS.

APPEAL FROM MUHLENBERG CIRCUIT COURT  
HON. ARTHUR T. ILER, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

\* \* \* \* \*

MAY IT PLEASE THE COURT:

PURPOSE OF REPLY BRIEF

THE PURPOSE OF THIS REPLY BRIEF IS  
TO RESPOND TO THE ARGUMENTS CON-  
TAINED IN THE BRIEF FOR APPELLEE  
IN THE ABOVE-CAPTIONED CASE.

QUESTIONS TO WHICH REPLY BRIEF ADDRESSED

I.

DID THE TRIAL COURT ERR TO APPELLANTS'  
SUBSTANTIAL PREJUDICE BY FAILING TO  
MAKE A RULING ON APPELLANTS' MOTION  
FOR A BILL OF PARTICULARS?

II.

DID THE TRIAL COURT ERR TO APPELLANTS'  
SUBSTANTIAL PREJUDICE BY NOT GRANTING  
APPELLANTS' MOTION FOR A DIRECTED VER-  
DICT ON THE GROUND THAT THE PROSECU-  
TION FAILED TO ESTABLISH THE REQUIRED  
CORPUS DELICTI OF THE ALLEGED CRIMINAL  
ACT?

III.

WERE APPELLANTS DENIED THEIR RIGHT TO  
FULL AND EFFECTIVE ASSISTANCE OF  
COUNSEL IN VIEW OF THEIR COUNSEL'S CON-  
FLICTING INTEREST IN REPRESENTING  
APPELLANTS' CO-INDICTEE, SHIRLEY SMITH?



IV.

DID THE TRIAL COURT ERR TO APPELLANTS' SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANTS' MOTION FOR A DIRECTED VERDICT OF ACQUITTAL SINCE THE ONLY EVIDENCE OF APPELLANTS' GUILT WAS THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE?

V.

DID THE TRIAL COURT ERR TO APPELLANTS' SUBSTANTIAL PREJUDICE BY FAILING TO INSTRUCT THE JURY THAT A CONVICTION CANNOT BE HAD UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE?

VI.

DID THE TRIAL COURT ERR TO APPELLANTS' SUBSTANTIAL PREJUDICE BY ADMITTING INTO EVIDENCE THE TESTIMONY OF CARL WYATT WITHOUT DETERMINING HIS COMPETENCY TO TESTIFY AS A WITNESS?

VII.

DID THE TRIAL COURT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY PERMITTING THE PROSECUTOR TO IMPEACH THE CREDIBILITY OF APPELLANT, VERNON SMITH, BY MEANS OF EVIDENCE OF PRIOR FELONY CONVICTIONS REMOTE IN TIME FROM THE DATE OF THE TRIAL?

VIII.

DID THE PROSECUTOR ERR TO APPELLANTS' SUBSTANTIAL PREJUDICE BY IMPROPER AND PREJUDICIAL COMMENTS DURING CLOSING ARGUMENT AS TO THE PROSECUTOR'S OPINION OF APPELLANTS' LACK OF CREDIBILITY AS A WITNESS?

IX.

DID THE TRIAL COURT ERR TO APPELLANTS' SUBSTANTIAL PREJUDICE BY SUBMITTING TO THE JURY AN INSTRUCTION ON THE CHARGED OFFENSE WHICH INCLUDED ALTERNATIVE MEANS BY WHICH THE CRIME COULD HAVE BEEN COMMITTED?

X.

DID THE TRIAL COURT ERR TO APPELLANTS' SUBSTANTIAL PREJUDICE BY FAILING TO INSTRUCT THE JURY SUA SPONTE THAT INTOXICATION IS A DEFENSE TO THE CHARGED OFFENSE IF IT NEGATIVES AN ELEMENT OF THE CHARGED OFFENSE?

XI.

DID THE TRIAL COURT ERR TO APPELLANTS' SUBSTANTIAL PREJUDICE BY OVERRULING THEIR MOTION FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE?

XII.

DID THE TRIAL COURT ERR TO APPELLANTS' SUBSTANTIAL PREJUDICE BY ADMITTING INTO EVIDENCE, IN OPPOSITION TO APPELLANTS' MOTION FOR A NEW TRIAL ON NEWLY DISCOVERED EVIDENCE, CERTAIN STATEMENTS ON INTERROGATION BY THE COMMONWEALTH ATTORNEY?

XIII.

DID THE CUMULATIVE EFFECT OF THE PRECEDING TWELVE ERRORS SUBSTANTIALLY PREJUDICE APPELLANTS' TRIAL AND DEPRIVE THEM OF THEIR CONSTITUTIONAL RIGHT TO A FAIR TRIAL?

ARGUMENTS

I.

THE TRIAL COURT ERRED TO APPELLANTS' SUBSTANTIAL PREJUDICE BY FAILING TO MAKE A RULING ON APPELLANTS' MOTION FOR A BILL OF PARTICULARS.

In the case sub judice, appellants were charged by an indictment which alleged three separate, alternative means by which they allegedly committed the crime of murder. In their initial brief, appellants submitted that the failure of the court below to grant their Motion for a Bill of Particulars resulted in appellants' coming to trial with vague, alternative theories still alleged against them. As a consequence, appellants were not provided with sufficient information to adequately prepare their defense. With the possibility of the Commonwealth's introducing multiple theories as to how the alleged crime occurred without giving notice to appellants, the danger of prejudicial surprise at the time of trial could not be and was not avoided.

Appellee initially presents two technical objections to this allegation of error. Both of these procedural arguments are felacious in the extreme.

Inasmuch as the Motion for a Bill of Particulars was filed on the same day as arraignment, the attorney for the Commonwealth concludes that the Motion was filed after arraignment and, consequently, the trial court was not required to rule on appellants' motion (appellee's brief, pp. 4-5). Appellee's premise is based on the flimsiest of speculation and conjecture. There is absolutely no indication in the record of the proceedings in the court below that the Motion was filed after arraignment. The only possible conclusion from the fact that both events occurred on May 24, 1974, is that appellants' Motion was timely filed pursuant to RCr 6.22. Consequently, the trial court erred by failing to grant appellants' Motion for a Bill of Particulars.

Appellee then submits a most novel argument that appellants' Motion was invalid "because there was no notice served with the motion" (appellee's brief, p. 5). Such an argument does not withstand the scrutiny of analysis. In Carnaham v. Yocum, Ky., 526 S.W.2d 301 (1975), cited by appellee in support of his proposition, the motion involved was a Motion to Dismiss pursuant to CR 56.02. Inasmuch as CR 56.03 requires a hearing on such a motion, this Court concluded that a notice of hearing was required in a Motion to Dismiss. Significantly, this Court in Carnaham issued the following admonition:

We doubt if there could be a hard  
and fast rule to the effect that  
a motion without a notice is no  
motion at all Id., at 304.

Inasmuch as there is no requirement in the Rules of Criminal Procedure in regard to a notice requirement, appellants submit that appellee's analysis is inapplicable to the instant case.

Appellee seeks to distinguish Finch v. Commonwealth, Ky., 419 S.W.2d 146 (1967) on the ground that the indictment in the instant case reveals "the nature of each theory presented at trial" (appellee's brief, p. 6). Appellee, however, ignores the basis of the argument contained in appellants' initial brief. The indictment in the case sub judice alleged three separate, alternative means by which appellants allegedly committed the crime. In Finch this Court recognized that where the accused is facing a "multiple-theoried prosecution" that a bill of particulars is needed "to enable them to prepare their defense" Id., at 147-148. Under RCr 6.22, when "cause" is shown, the trial court is required to direct the filing of a bill of particulars. In the case at bar, appellants' defense counsel demonstrated such "cause" when he informed the trial court that the multi-theoried indictment placed "an unreasonable burden on the defendants to prepare a defense for all three alternative grounds" (T.R., p. 70).

Lastly, the attorney for the Commonwealth argues that the requested information was available to appellants and, consequently, a bill of particulars was not required (appellee's brief, pp. 7-8). Appellants submit that it cannot be assumed that appellants possessed sufficient information to prepare their defense in the face of this indictment. Appellee's arguments "would presume that defendants are guilty, rather than invoking the proper presumption of innocence" United States v. Tanner, 279 F.Supp. 457, 474 (N.E. 111., 1967).

In their definite and specific Motion for a Bill of Particulars, appellants merely sought the minimal information necessary to prepare their defense and avoid surprise at trial. Denial of the discovery of these basic facts resulted in unfair surprise at trial and in having significantly impeded

appellants' preparation of their defense. Therefore, the trial court's refusal to grant appellants the discovery of these facts constituted reversible error.

## II.

THE TRIAL COURT ERRED TO APPELLANTS' SUBSTANTIAL PREJUDICE BY NOT GRANTING APPELLANTS' MOTION FOR A DIRECTED VERDICT ON THE GROUND THAT THE PROSECUTION FAILED TO ESTABLISH THE REQUIRED CORPUS DELICTI OF THE ALLEGED CRIMINAL ACT.

Appellee initially urges that "appellants waived their motion for a directed verdict by introducing evidence in their own behalf" (appellee's brief, p. 9). However, the case relied upon by appellee, Thompson v. Commonwealth, 299 Ky. 697, 187 S.W.2d 265 (1945), does not deal with a waiver of a motion for a directed verdict. Rather, in Thompson this Court held that the defendant's testimony was sufficient to corroborate the testimony of an accomplice introduced by the prosecution. Significantly, counsel for the Commonwealth was unable to cite any decision of this Court in support of his proposition.

It is unquestionable that appellants made a timely motion for a directed verdict at the close of the case for the prosecution (T.E., p. 206). Furthermore, trial defense counsel utilized this allegation of error as one ground in support of his Motion for a New Trial (ground 2; T.R., p. 186). Accordingly, this ground for reversal is preserved for appellate review by this Court.

Appellee then reviews the "circumstantial evidence" which allegedly demonstrated the requisite corpus delicti (appellee's brief, pp. 10-13). Appellant will concede that the evidence reviewed in appellee's brief demonstrates that several items were missing from the deceased's home and that appellants

might have been present at the scene of the crime. However, appellants were never indicted for any robbery charge, and, in this Commonwealth, mere presence at the scene is not sufficient "to justify a conviction" Marcum v. Commonwealth, Ky., 496 S.W.2d 346, 349 (1973). The attorney for the Commonwealth has assisted in demonstrating this fatal weakness in the prosecution case.

In their initial brief, appellants reviewed the requirement that the prosecution prove beyond a reasonable doubt the necessary elements of the corpus delicti, and found the evidence to be lacking under both theories of the cause of death.

In regard to the "striking and beating" theory, the proof adduced at trial was sufficient only to demonstrate the crime of assault and battery. The prosecution witnesses could not testify that a blow to the deceased's head caused his death. Appellants submit that the Commonwealth failed to introduce "clear and cogent evidence that death was the result of the crime" Witt v. Commonwealth, 305 Ky. 31, 202 S.W.2d 612, 616 (1947).

In regard to the "burning him" theory, the burden of proof was on the Commonwealth to prove not only the burning of the building in question, but also to demonstrate that it was burned by the willful act of some person criminally responsible for his acts, and not by natural or accidental causes. According to the arson investigator for the Kentucky State Police, there was no physical evidence of arson (T.E., pp. 163-164). The only possible conclusion that can be reached from the other evidence introduced at the court below was that an accidental fire was likely (see appellant's brief, p. 16). Appellants submit that the Commonwealth failed to introduce any tangible, substantive evidence of the criminal cause of the fire.

Parenthetically, it must be noted that appellee elected not to contravene any of the statements of fact or conclusions of law delineated in appellant's brief on this allegation of error. The inescapable conclusion is that appellee has tacitly conceded the validity of appellants' argument.

Appellants submit that the prosecution failed in its burden to prove the corpus delicti beyond a reasonable doubt. Consequently, the trial court erred in overruling appellants' Motion for a Directed Verdict of Acquittal.

### III.

APPELLANTS WERE DENIED THEIR RIGHT  
TO FULL AND EFFECTIVE ASSISTANCE OF  
COUNSEL IN VIEW OF THEIR COUNSEL'S  
CONFLICTING INTEREST IN REPRESENTING  
APPELLANTS' CO-INDICTEE, SHIRLEY SMITH.

In their initial brief, appellants extensively argued that they were denied the effective assistance of counsel because their trial defense counsel was faced with conflicting interests in defending appellants while having the obligation to cross-examine a former client, Shirley Smith (appellants' brief, pp. 18-24). Appellee elected not to respond in any fashion to this assignment of error. Appellants submit that this failure to respond to this material allegation of error amounts to nothing less than a confession of error and requires reversal of appellants' conviction.

It is a general rule of appellate procedure that the failure of appellee to file a brief is considered to be a confession of error. Allen v. Murphy, Ky., 255 S.W.2d 23 (1953). Under such circumstances, this Court is justified in accepting appellants' statement of facts and conclusions of law as correct and in reversing the judgment if "appellants brief appears reasonably to sustain the contention" Calvert Fire Ins. Co. v. Osborne, Ky., 267 S.W.2d 727, 728 (1954).

Appellants submit that this Court should apply the same analysis to a situation where appellee fails to respond to an assignment of error contained a brief for appellant.

Furthermore, under RCA 1.210(b)(2), the appellee's brief must respond to all principal questions involved on the appeal. If appellee fails to comply with this requirement, this Court, pursuant to RCA 1.260(c), may take one of the following actions:

- (1) Accept the appellant's statement of the facts and issues as correct; or
- (2) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (3) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

It is unquestionable that this assignment of error presents a reasonable contention of reversible error. When a defense counsel has a past attorney-client relationship with a prosecution witness (especially one arising out of the same case) with the result that he cannot give his unfettered attention to his client, the defense counsel most assuredly has a directly conflicting interest, Tucker v. United States, 235 F.2d 238 (9th Cir. 1956). Additionally, the fact that the trial judge in the instant case was informed of the existence of the conflict of interest created a sua sponte obligation to investigate whether the conflict would preclude the possibility of effective assistance of counsel. United States v. Alberti, 270 F.2d 878 (2nd Cir. 1973). Finally, the mere possibility of harm is sufficient to render appellants' conviction invalid. Sawyer v. Brough, 358 F.2d 70 (5th Cir. 1965).

Appellants' assignment of error stands unrefuted in law or fact by the pleadings before this Court. Consequently, appellants respectfully request this Court to consider appellee's



failure to respond as a concession of error, and reverse their conviction by the Muhlenberg Circuit Court. Carpenter v. Commonwealth, Ky., 323 S.W.2d 861 (1959).

#### IV.

THE TRIAL COURT ERRED TO APPELLANTS' SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANTS' MOTION FOR A DIRECTED VERDICT OF ACQUITTAL SINCE THE ONLY EVIDENCE OF APPELLANTS' GUILT WAS THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

Appellee argues that inasmuch as Shirley Smith "entered a plea of guilty to being an accomplice after the fact" that she could not be considered an accomplice (appellee's brief, p. 15). Appellee completely ignores the curious circumstances surrounding this guilty plea.

It should be initially noted that Shirley Smith entered a plea of guilty to aiding or comforting a robber or burglar. Specifically, it was charged that Ms. Smith "feloniously and knowingly aided or gave protection or gave comfort to Vernon Smith and Billy Kimmel after said Vernon Smith and Kimmel had robbed Crushaw Gray of guns and money on March 10, 1974" (appendix, appellant's brief, p. 1). However, appellants were neither indicted nor convicted for any robbery of Mr. Gray. The questionable nature of this guilty plea is further reinforced when it is remembered that from May 21, 1974, until October 3, 1974, the indictment for murder stood without question against Shirley Smith. It is apparent from the record Ms. Smith's conviction on the lesser charge occurred only as a result of extensive plea bargaining. In exchange for her turning prosecution witness, the charge of murder was dismissed.

When viewing the above factors in light of the significant fact that there never was a judicial determination that Shirley Smith was not involved with appellants in the

in the alleged crime, the probability of her involvement rises to near certainty. Accordingly, appellants submit that Shirley Smith was an accomplice as a matter of law.

Appellee then submits that "there was sufficient evidence to corroborate her [Shirley Smith's] testimony connecting the appellants with the crime" (appellee's brief, p. 16). It must be noted at this point, however, that the crime with which appellants were charged was the murder of Rusaw Gray in violation of KRS 435.100 -- not robbery. The corroborating evidence required by RCr 9.62 must tend to connect the accused with the commission of the offense charged. Hopper v. Commonwealth, Ky., 419 S.W.2d 756 (1967). The proffered corroborative evidence must be of such nature and character as to inspire belief in a reasonable and unprejudiced man that it points toward guilt and links up with the principal fact under investigation. Benge v. Commonwealth, Ky., 476 S.W.2d 618 (1972).

An examination of the evidence reviewed by appellee (appellee's brief, pp. 16-18) conclusively demonstrates that it might tend to connect appellants with the robbery of items from Mr. Gray. However, in no stretch of the imagination does the testimony summarized by appellee tend to connect appellants with the offense charged -- the murder of Rusaw Gray.

In the instant case, the only evidence which tended to connect appellant with the charged offense was the testimony of the accomplice, Shirley Smith. Since no other competent evidence was introduced to corroborate the testimony of the accomplice, the trial judge was required to grant defense counsel's motion and direct a verdict of acquittal. RCr 9.62; Hartsock v. Commonwealth, Ky., 382 S.W.2d 861 (1964).

Accordingly, this Court should reverse the judgment below.

V.

THE TRIAL COURT ERRED TO APPELLANTS' SUBSTANTIAL PREJUDICE BY FAILING TO INSTRUCT THE JURY THAT A CONVICTION CANNOT BE HAD UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

In their initial brief, appellants explained that this Court has recognized that if there is a reasonable doubt as to whether Shirley Smith was an accomplice, the jury should have determined that question under a proper instruction by the trial court. Accordingly, the trial judge in the instant case had a sua sponte obligation to give such an instruction to the jury.

The unresponsive contention of the attorney for the Commonwealth was that this assignment of error was not preserved for appellate review (appellee's brief, p. 19). However, appellants argued in their initial brief that the lack of this instruction allowed the jury to render a verdict of guilty based solely upon the accomplice's accounts of what transpired. As such, "a manifest injustice" occurred which warrants this Court to review this assignment of error even though the specific error was never presented to the trial court. Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970). Consequently, appellee's obligation in his brief was to demonstrate that this series of events did not create "a manifest injustice." Appellee failed to shoulder this burden at all, and did not attempt to contravene appellants' allegation. This lack of response must be taken as a tacit concession of the validity of appellants' position.

In the case sub judice, no instruction on corroboration was given and substantial prejudice to appellants necessarily resulted. On the basis of this error, this Court should reverse appellants' conviction.

## VI.

THE TRIAL COURT ERRED TO APPELLANTS'  
SUBSTANTIAL PREJUDICE BY ADMITTING  
INTO EVIDENCE THE TESTIMONY OF  
CARL WYATT WITHOUT DETERMINING HIS  
COMPETENCY TO TESTIFY AS A WITNESS.

The attorney for the Commonwealth contends that this assignment of error was not preserved for appellate review inasmuch as appellants' defense counsel did not object to Mr. Wyatt's testimony until the close of the prosecution's case. However, appellee's reliance on Nunn v. Slemmons' Adm'r, 298 Ky. 315, 182 S.W.2d 888 (1944), on this point is inappropriate. In Nunn, this Court was examining the issue of the competency of a witness to testify on a particular subject. Specifically, the question presented in the cited case was whether the beneficiary of a will was competent to testify "concerning the act of the testatrix in writing and executing the codicil" Id., 182 S.W.2d at 889. This is totally different from the question presented in appellants' initial brief -- whether Carl Wyatt had the mental capacity to offer competent testimony in the court below.

It should be recalled that the purpose of an objection is to bring to the attention of the trial court an alleged error so as to grant the court the opportunity to correct the error itself. Consequently, if the trial court itself recognizes that the grounds for an objection exist, then the trial judge has a sua sponte duty to take the appropriate steps to correct the situation. The latter is the situation in the instant case.

During Wyatt's testimony, the trial judge, in overruling defense counsel's objections, recognized that the witness was "difficult to understand" and that to properly understand him "you would probably need an interpreter" (T.E., pp. 169-170). Later, during cross-examination, it

became apparent that Mr. Wyatt had spent some twenty-eight (28) years at Western State Hospital (T.E., p. 174). At times, the court reporter could not understand the witness' testimony (T.E., p. 178). In overruling appellants' Motion for a Mistrial, the trial judge described Mr. Wyatt as incoherent, retarded, and disturbed (T.E., pp. 210-211). Furthermore, the court below realized that Wyatt's "testimony as taken by the reporter probably is not consistent with all that he said" (T.E., pp. 210-211). Under such a situation, appellants submit that the court below had a sua sponte obligation to investigate the witness' mental capacity to testify.

In Whitehead v. Stith, 268 Ky. 703, 105 S.W.2d 834 (1937), this Court recognized that if a reasonable doubt as to the competency of a witness is raised, the trial court has an obligation to investigate the issue. Prior hospitalization for mental treatment is one indicia which may create an affirmative duty of a court to determine the witness' competency. City of Covington v. O'Meara, 133 Ky. 762, 119 S.W.187 (1909).

The failure of the trial court to either inquire into Mr. Wyatt's competency, or to strike his testimony, or to grant a mistrial constituted reversible error. Consequently, appellants request this Court to reverse their conviction by the court below.

#### VII.

THE TRIAL COURT ERRED TO APPELLANT'S  
SUBSTANTIAL PREJUDICE BY PERMITTING  
THE PROSECUTOR TO IMPEACH THE CREDI-  
BILITY OF APPELLANT, VERNON SMITH,  
BY MEANS OF EVIDENCE OF PRIOR FELONY  
CONVICTIONS REMOTE IN TIME FROM THE  
DATE OF TRIAL.

In view of the response of the attorney for the Commonwealth to this assignment of error, appellant will rely upon the statements of fact and conclusions of law contained in his initial brief.

VIII.

THE PROSECUTOR ERRED TO APPELLANTS' SUBSTANTIAL PREJUDICE BY IMPROPER AND PREJUDICIAL COMMENTS DURING CLOSING ARGUMENT AS TO THE PROSECUTOR'S OPINION OF APPELLANTS' LACK OF CREDIBILITY AS A WITNESS.

Appellee submits that the comments of the Commonwealth's Attorney in the case sub judice "merely stated that the appellants had good reason to lie and that the testimony of the family must be taken as that of prejudiced witnesses," and thus were not prejudicial. (Appellee's brief, p. 25). However, appellee did not examine the net effect on the jurors that an argument like this would have on their eventual verdict.

The direct effect of the assertion of the prosecutor of the lack of credibility of appellants and their witnesses is, in essence, his opinion as to the guilt of the accused. Harris v United States, 402 F.2d 656, 658 (D.C. Cir. 1968). Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with his office, but also because of the fact-finding facilities presumably available to him. ABA Standards Relating To The Prosecution Function, §5.3 Commentary; Greenberg v. United States, 289 F.2d 472, 474-475 (1st Cir. 1960). Consequently, it is unquestionable that these statements were prejudicial to the presentation of appellants' defense in the court below.

The attorney for the Commonwealth then argues that appellants' failure to object at trial was a waiver of their right to appellate review (appellee's brief, p. 24). Appellants in their initial brief extensively discussed why this Court should review this assignment of error even though it

was not technically preserved by objection (appellant's brief, pp. 42-44). Appellee has declined to address appellants' arguments on the question of waiver and has merely relied on the absence of an objection as a procedural basis for denying appellate review.

Additionally, appellants submit that the improper and prejudicial argument of the prosecutor was of sufficient magnitude to constitute a denial of appellants' right to due process.

This Court in Jackson v. Commonwealth, Ky., 450 S.W.2d 244 (1970), quoted the following language regarding the waiver of constitutional rights:

Violations of constitutional rights, the same as of other rights, may be waived by failure to make timely and appropriate objection.\* \* \*Of course in an aggravated case involving violations of such proportions as in effect to deprive the defendant of due process the appellate court may grant relief notwithstanding failure to make proper objection. Id., at 246 (emphasis added).

Significantly, the Jackson opinion stands for the principle that an appellate court may reverse a conviction on the basis of an error which deprives a defendant of due process even though it was not properly preserved for appellate review. See also Futrell v. Commonwealth, Ky., 437 S.W.2d 487, 488 (1969).

As the Supreme Court has reiterated time and time again, "[e]xercise of calm and informed judgment. . . [a jury's] members is essential to proper enforcement of law." Turner v. Louisiana, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) citing Sinclair v. United States, 279 U.S. 749, 765, 49 S.Ct. 471, 73 L.Ed. 938 (1929). Highly prejudicial remarks uttered by the prosecutor jeopardize the jury's deliberative processes and hence infringe upon accused's

right to a fair hearing on the merits of the case. Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973).

The Supreme Court has recognized that a prosecutor's egregious misconduct in closing argument can amount to a denial of constitutional due process. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 1873, \_\_\_\_ L.Ed.2d \_\_\_\_ (1974). In the case at bar the totality of the prosecutor's improper argument, under the circumstances, did not comport with the "fundamental fairness" requirement of due process.

In the past this Court has acknowledged its responsibility to condemn the use of unfair methods of prosecutors to obtain convictions. Such improper practices cannot be countenanced because those procedures bring the courts into disrepute and disgust those who view the courts as symbols of justice. Coates v. Commonwealth, Ky., 469 S.W.2d 346 (1971).

On the basis of this error, appellants' conviction must be reversed.

#### IX.

THE TRIAL COURT ERRED TO APPELLANTS' SUBSTANTIAL PREJUDICE BY SUBMITTING TO THE JURY AN INSTRUCTION ON THE CHARGED OFFENSE WHICH INCLUDED ALTERNATIVE MEANS BY WHICH THE CRIME COULD HAVE BEEN COMMITTED.

#### A.

THE INSTRUCTION IS NOT SUPPORTED BY EVIDENCE INTRODUCED BY THE COMMONWEALTH.

In response to this assignment of error, appellee reiterates his rather absurd theory that circumstantial evidence of theft when combined with the fact that Mr. Gray's house burned is sufficient to support a conviction of murder by a criminal act of arson. The attorney for the Commonwealth



continues to ignore the fact that there was no evidence of arson discovered by any law enforcement officer.

Appellee then repeats his myopic opinion that evidence of a skull fracture was sufficient to support death by striking the deceased with a hammer. Appellee ignores, once again, the testimony of the prosecution witness who was unwilling to make such a conjecture on the cause of Mr. Gray's death.

Appellants have extensively discussed this subject, supported by cases from this Commonwealth and other jurisdictions, in both their initial brief and in this pleading. Consequently, in view of limited response of the Commonwealth, appellants will rely upon the statements of fact and conclusions of law previously discussed.

B.

THE INSTRUCTION WAS NOT SUFFICIENT  
IN THAT IT DID NOT REQUIRE THAT THE  
JURY BE UNANIMOUS AS TO ONE OF THE  
ALTERNATIVE MEANS CHARGED.

Appellee's sole response to appellants' argument is that "there was ample evidence to support either cause of death" (appellee's brief, p. 26). Assuming arguendo that this statement is true, appellants submit that this conclusively demonstrates the fatal defect which inheres in the instruction submitted by the trial court. The general verdict returned by the jury does not permit this Court, or anyone reviewing this case, to determine upon which theory the jury based its verdict. The trial court's instruction on the alleged offense contained two alternative theories of the cause of death. With the two means linked by the disjunctive "or", the jury was authorized to find appellants guilty if they found that appellants murdered Rusaw Gray "by one of either of said causes" (T.E., p. 329; T.R., p. 180).

Conceivably, half of the jury in the instant case might have found appellants guilty on one theory and half on another theory. This is the very reason that the Supreme Court of Washington in State v. Golladay, Wash., 470 P.2d 191 (1970), felt compelled to reverse the conviction. The uncertainty of the verdict in the case sub judice could have been cured had the trial judge instructed the jury that their verdict must be unanimous as to one of the alternative theories contained in the instruction. However, the court below failed to do this.

It is beyond question that in order to comport with the requirements of due process, the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Inasmuch as the instruction tendered by the court below negated this constitutional requirement, appellants' conviction on the basis of this instruction constitutes a denial of due process. Consequently, this Court must reverse their conviction by the Muhlenberg Circuit Court.

X.

THE TRIAL COURT ERRED TO APPELLANTS'  
SUBSTANTIAL PREJUDICE BY FAILING TO  
INSTRUCT THE JURY SUA SPONTE THAT  
INTOXICATION IS A DEFENSE TO THE  
CHARGED OFFENSE IF IT NEGATIVES AN  
ELEMENT OF THE CHARGED OFFENSE.

Appellee's sole substantive response to this allegation of error is that appellants waived their right to appellate review inasmuch as there was no request for such an instruction (appellee's brief, p. 27). Appellants, in their initial brief, acknowledged that trial defense counsel did not request an instruction on intoxication as a defense, but offered a detailed explanation of why appellate review was

still available despite the absence of a trial objection (appellants' brief, pp. 50-51). Appellee has declined to address appellants' arguments on the question of waiver and has merely relied on the absence of a request as a procedural basis for denying appellate review.

Inasmuch as the attorney for the Commonwealth failed to contravene any substantial statements of fact or conclusions of law contained in appellants' initial brief, appellants will rely upon the arguments previously discussed in their original pleadings.

#### XI.

THE TRIAL COURT ERRED TO APPELLANTS'  
SUBSTANTIAL PREJUDICE BY OVERRULING  
THEIR MOTION FOR A NEW TRIAL ON THE  
GROUND OF NEWLY DISCOVERED EVIDENCE.

Appellee submits that inasmuch as "Bryant Page did not testify that there was no other car on the road on that day" that Mr. Dwyer's affidavit "did not contradict any of the prosecution's testimony" (appellee's brief, pp. 28-29). Appellants submit that the attorney for the Commonwealth misanalyzed the evidence adduced at trial.

In describing the events in the afternoon of March 10, 1974, Bryant Page alluded that the white car occupied by appellants was the only car to pass the coal company on that day. As defense counsel explained the significance of Ms. Dwyer's affidavit:

This point is critical, your honor, because if the testimony of Hunky Page is to be believed, there is only the one car. If there were two cars in fact on that road, then the testimony of Hunk Page becomes suspect (T.E., pp. 351-352).

The import of Bryant Page's testimony is obvious. The appellants' defense is simply that they did not commit the crime for which they are charged. Yet Mr. Page's testimony seemingly precludes the possibility of any other

party being at Mr. Gray's home on the day in question. Contrasted with this is Mrs. Dwyer's affidavit that she and a companion saw another vehicle on March 10, 1974, on the road leading from Mr. Gray's house near the time of the crime.

Inasmuch as the prosecution greatly relied upon circumstantial evidence in the presentation of their case, the rebutting of Mr. Page's testimony might have made a serious difference in the minds of the jury. Consequently, appellants submit that the court below erred in overruling their motion. Dolan v. Commonwealth, Ky., 468 S.W.2d 277 (1971).

## XII.

THE TRIAL COURT ERRED TO APPELLANTS' SUBSTANTIAL PREJUDICE BY ADMITTING INTO EVIDENCE, IN OPPOSITION TO APPELLANTS MOTION FOR A NEW TRIAL ON NEWLY DISCOVERED EVIDENCE, CERTAIN STATEMENTS ON INTERROGATION BY THE COMMONWEALTH ATTORNEY.

Appellee's perfunctory argument was that "these depositions were in effect no more than affidavits" (appellee's brief, p. 29). This contention ignores the fact that they were not taken under oath, and that they all were taken out of court with neither appellants nor defense counsel present (T.E., pp. 255, 268, 276, 284).

Furthermore, appellee did not even attempt to contravene the allegation of appellants that the utilization of these statements was a denial of their right of confrontation under the Sixth Amendment to the U.S. Constitution and the Eleventh Amendment of the Kentucky Constitution. This lack of response must be regarded as a tacit concession of the merit of appellants' assignment of error.

The only reply of the attorney for the Commonwealth was that these actions in the court below did not constitute

"substantial error" (appellee's brief, p. 29).

However, it is a well settled principle that once the right to cross-examination as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution has been abridged, then the person whose right has been abridged does not have to show prejudice. When cross-examination is involved, the defendant need not show that he would win his case if permitted the right denied him.

Dixon v. United States, 333 F.2d 348, 353 (4th Cir. 1964).

"Cross-examination of a witness is a matter of right. . . Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply." Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 219, 75 L.Ed. 624 (1931).

The Supreme Court has consistently found that where the Sixth Amendment right of cross-examination has been abridged, prejudice need not be shown:

It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. Alford v. United States, 51 S.Ct. at 219.

Accordingly, appellants respectfully request this Court to reverse their conviction by the Muhlenberg Circuit Court.

XIII.

THE CUMULATIVE EFFECT OF THE PRECEDING  
TWELVE ERRORS SUBSTANTIALLY PREJUDICED  
APPELLANTS' TRIAL AND DEPRIVED THEM OF  
THEIR CONSTITUTIONAL RIGHT TO A FAIR  
TRIAL.

In view of the nature of appellee's response to  
this error, appellants will rest on the arguments and legal  
precedents cited in his initial pleading.

Accordingly, on the basis of the cumulative effect  
of the assigned errors, this Court must reverse appellants'  
conviction and order a new trial.

CONCLUSION

For the foregoing reasons, appellants respectfully  
request that the judgment of the lower court be reversed.

Respectfully submitted,

JACK EMORY FARLEY  
PUBLIC DEFENDER  
COMMONWEALTH OF KENTUCKY  
625 LEAWOOD DRIVE  
FRANKFORT, KENTUCKY 40601

BY: William M. Radigan  
WILLIAM M. RADIGAN  
ASSISTANT PUBLIC DEFENDER